IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 20, 2008

STATE OF TENNESSEE v. LUCKY HOLLANDSWORTH

Appeal from the Circuit Court for Warren County
No. M-11026 Larry B. Stanley, Jr., Judge

No. M2007-02404-CCA-R3-CD - Filed December 12, 2008

The defendant, Lucky Hollandsworth, was convicted by a jury in the Warren County Circuit Court of theft of property valued at $500 or less, a Class A misdemeanor. See T.C.A. §§ 39-14-103 (2006) (theft of property); -105 (2006) (grading of theft). The defendant received a sentence of eleven months and twenty-nine days, with 150 days to be served in jail and the balance to be served on probation. In this appeal, the defendant contends (1) that the evidence is insufficient to support his conviction, (2) that the trial court erred in its jury instructions on identity, and (3) that the trial court erred in sentencing him. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Dan T. Bryant, District Public Defender, and Trenena G. Wilcher, Assistant Public Defender, for the appellant, Lucky Hollandsworth.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Lisa Zavogiannis, District Attorney General and Thomas J. Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to the statement of the evidence, Tim Christmas testified that he was the manager of the McMinnville Big Lots store and was working on December 30, 2006, when the defendant came into the store. Mr. Christmas said that he was standing near the front of the store with Sherry Shields and that he recognized the defendant because the defendant had been in the store earlier in the day and another Big Lots employee had pointed out the defendant to Mr. Christmas. He said that the defendant was wearing a gray hooded sweatshirt but that the hood was not pulled up. He said that he saw the defendant go down an aisle but that he and Ms. Shields could not see what the defendant did after that. He said he saw the defendant emerge from the aisle and go through an inner

set of doors into the store's vestibule. He said that less than a minute later, the defendant came running into the store with his hood pulled up over his head, ran down the same aisle he had entered previously, and came running back out with a box containing a computer desk under his arm. Mr. Christmas said that he and Ms. Shields chased the defendant out of the building and that he saw the defendant put the box through the open window of a small, blue, two-door car. He said that the car sped off and that the defendant fled on foot in the opposite direction. Mr. Christmas said he was not able to chase the defendant because he had recently had surgery. He said this took place at about 6:00 p.m. and that it was dark outside. He said the value of the computer desk was $59.95. He said that although the store had video surveillance equipment, the images of the perpetrator were not clear enough to be of value. He offered his theory that the defendant had moved the computer desk to the first aisle of the store, which he said was not the aisle where computer desks were displayed, in order to facilitate the theft when the defendant returned to the store.

According to the statement of evidence, "[Sherry] Shields was present on the date and time of the incident in question, and her testimony was substantially the same as that of Mr. Christmas, with a few variances." Ms. Shields testified that she recognized the defendant when he came into the store because another employee had identified him by name and sight when the defendant was in the store on an earlier occasion. However, Ms. Shields stated that she could not see very well when the defendant was in the store because she was not wearing her glasses. She said the incident occurred in the late afternoon because it was not quite dark. She said she and Mr. Christmas chased the defendant out of the store and that the car outside was a four-door car. She said she yelled, "Lucky, stop!" as the defendant fled. Ms. Shields stated that the defendant's hair and beard were shorter at the trial than on December 30.

Ronald Kloosterman testified on behalf of the defendant that he and the defendant had gone to Big Lots "much earlier in the day" because Mr. Kloosterman needed to look for a baby monitor. He said the defendant was wearing a gray hooded sweatshirt. He said that he and the defendant spoke to John Haley, a Big Lots employee.

The jury found the defendant guilty of theft of property valued at $500 or less. The trial court sentenced the defendant to eleven months and twenty-nine days, with 150 days to be served in jail, restitution of $65, and sixteen hours of community service, and it barred the defendant from the premises of Big Lots.

I

The defendant challenges the sufficiency of the convicting evidence. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571

S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The statute under which the defendant was convicted provides, "A person commits theft of property if, with the intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103. The defendant argues that the state failed to present sufficient eyewitness identification of the defendant to prove that he was the perpetrator of the theft. However, the testimony of Mr. Christmas and Ms. Shields was sufficient to establish that the defendant was the person who stole the computer desk. Both Mr. Christmas and Ms. Shields knew who the defendant was because of previous identifications of him by another employee or employees of Big Lots. Both saw the defendant wearing a gray hooded sweatshirt, which was the same type of shirt that Mr. Kloosterman said the defendant had been wearing earlier in the day. Despite Ms. Shields's testimony that she was not wearing her glasses, slight variations in the testimony of Ms. Shields and Mr. Christmas about whether the car outside had two doors or four doors, and Ms. Shields's lack of testimony about the defendant coming inside the store, leaving, then returning, the evidence viewed in the light most favorable to the State is sufficient to support the conviction.

II

Next, we consider the defendant's argument that the trial court committed reversible error in its jury instruction on identification. The technical record reflects that the trial court gave an instruction corresponding with Tennessee Pattern Instruction 42.05(a), which states:

> The Court charges you that the identity of the defendant must be proven in the case on the part of the State to your satisfaction beyond a reasonable doubt. In other words, the burden of proof is on the State to show that the defendant now on trial before you is the identical person who committed the alleged crime with which he is charged. In considering the identity of a person, the Jury may take into consideration all the facts and circumstances of the case.
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> The Court further charges you that if you are satisfied from the whole proof in the case, beyond a reasonable doubt, that the defendant committed the crime charged against him, and you are satisfied beyond a reasonable doubt that he has been identified as the person who committed the crime charged, then it would be your duty to convict him. On the other hand, if you are not satisfied with the identity from the proof, or you have a reasonable doubt as to whether he has been identified from the whole body of the proof in the case, then you should return a verdict of not guilty.

The defendant argues that the trial court was required to give the more lengthy instruction announced in State v. Dyle, 899 S.W.2d 607 (Tenn. 1995), which is incorporated into Tennessee Pattern Instruction 42.05, because identity was a material issue at trial. The defendant acknowledges his trial counsel did not request the more detailed identity instruction but claims the error was not harmless. The State concedes error but maintains that it was harmless given that two witnesses identified the defendant as the perpetrator and that another witness corroborated this testimony by saying the defendant was wearing a gray hooded sweatshirt on the day of the crime.

The defendant is correct that the trial court should have given the more detailed identity instruction announced by Dyle and contained in Tennessee Pattern Instruction 42.05. However, as recognized in Dyle, the failure to give this instruction is plain error only when identification is a material issue and the defendant requests the instruction. Dyle, 899 S.W.2d at 612. Here, the defendant did not request the instruction, and the error is reviewed under the harmless error rule of Tennessee Rule of Criminal Procedure 52. See Dyle, 899 S.W.2d at 612. The statement of the evidence reflects that both Mr. Christmas and Ms. Shields positively identified the defendant as the perpetrator of the crime. Both witnesses had observed the defendant on a previous occasion and had him identified to them by another store employee or employees. Although Ms. Shields testified that she was not wearing her glasses and could not see very well, nothing in the statement of evidence indicates any uncertainty in her identification of the defendant. The discrepancy in Mr. Christmas's and Ms. Shields's testimony about whether the car had two doors or four doors does not diminish the reliability of their identifications of the defendant. Their testimony about the defendant's attire was corroborated by Mr. Kloosterman's testimony that the defendant was wearing the same type of shirt on the day of the crimes as had been identified by Mr. Christmas and Ms. Shields. Further, the technical record reflects that the trial court gave the proper pattern instruction on assessing credibility of witnesses. The failure to give the enhanced instruction in these circumstances was harmless error. See Tenn. R. Crim. P. 52(a).

III

The defendant argues that the trial court erred in sentencing him to serve 150 days in jail. The defendant claims that the trial court failed to consider the principles of sentencing, particularly whether the sentence was the least severe measure necessary to achieve its purposes, although he concedes that there is no transcript to reflect the trial court's reasoning in arriving at the sentence. The State counters that the defendant has not demonstrated that the sentence was improper.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d) (2006). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When determining if confinement is appropriate, the trial court should consider whether (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. T.C.A. § 40-35-103(1)(A)-(C) (2006). The trial court may also consider a defendant's potential or lack of potential for rehabilitation and the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. §§ 40-35-103(5) (2006), -210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). The sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. T.C.A. § 40-35-103(4).

In the present case, the statement of the evidence fails to reflect the considerations the trial court found significant in imposing a sentence involving 150 days of jail service. We note that the State filed a notice of intent to use prior convictions for impeachment reflecting the defendant's prior convictions of aggravated burglary, worthless checks, and theft. Further, the record reflects that the defendant's crime was one which involved planning and preparation. However, we are unable to determine whether these factors or others influenced the trial court in its sentencing determination. It is the duty of the appellant to see that the record contains a fair, accurate, and complete account of what transpired in the trial court with respect to all issues on which he seeks to obtain relief. State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); see T.R.A.P. 24 (content and preparation of the appellate record). When the necessary information is absent from the appellate record, the appellate court is precluded from ruling on the issue presented. Ballard, 855 S.W.2d at 560-61; State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). In the present case, we are unable to review this issue without knowing the basis upon which the trial court made its ruling. Otherwise, we presume that the trial court's actions were justified and correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Thus, the defendant is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE